



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1669 OF 2012**

**TOM OCHIENG ODHIAMBO ..... CLAIMANT**

**VERSUS**

**KENYA LITERATURE BUREAU ..... RESPONDENT**

**Mr. Ongincho for Claimant**

**M/S Cherono for Respondent**

**JUDGMENT**

1. This suit was brought by the Claimant via a Memorandum of Claim dated 17<sup>th</sup> September 2012 seeking payment of terminal benefits and compensation for wrongful termination of employment.

2. The Respondent filed a Memorandum of Response to the claim dated 3<sup>rd</sup> December 2012 with a counterclaim and set off.

The Respondent later filed an Amended Response and list of documents dated 3<sup>rd</sup> December 2012 and 3<sup>rd</sup> June 2013 respectively.

3. The Counterclaim is for Kshs.413,702.65 with interest at 6.5% from 30<sup>th</sup> November 2012 on account of a car loan advanced to the Claimant. The loan owed to the Respondent is admitted by the Claimant. The Claimant further admits owing Kshs.25,000.00 being the balance of money advanced to buy a laptop.

4. **Claimant's case**

The Claimant was employed by the Respondent as a Warehouse Manager on 28<sup>th</sup> September at a monthly salary of Kshs.65,000.00. He worked continuously until when his employment was terminated for loss of stock.

At the time of termination, the gross monthly salary was Kshs.101,060.00.

The duties of the Claimant included being in charge of Stock Inventory and Movement. He also made requisition of stock upon information by the Clerical Officer.

5. On 9<sup>th</sup> November 2011, the suppliers of paper delivered 200 reams. The delivery note indicated that they had delivered 250 reams. The Claimant signed the delivery note acknowledging receipt of 250 reams of paper.

6. The Claimant told the Court that he signed the delivery note on the understanding that the shortfall of 50 reams would be brought the following day.

On 10<sup>th</sup> November 2011, the supplier brought 250 reams of paper and did not bring the 50 reams to compensate the shortfall for the day before.

The Claimant altered the delivery note for 10<sup>th</sup> November 2011, to reflect 200 reams had been delivered so as to cater for the shortfall for the day before.

7. The Security Officer at the point of delivery had noted the discrepancy in the delivery note for the 9<sup>th</sup> November 2011. He reported the matter to his superiors.

This triggered a chain of events leading to the suspension of the Claimant, physical stock take of the stores and an Audit to determine whether the stocks received on paper were indeed received at the warehouse.

Discrepancies were discovered leading to the disciplinary measures against the Claimant and his termination from employment.

8. The Claimant denies that he was involved in misappropriation of the company stock to the loss and detriment of the Respondent stating that he relied on the staff to update the bin cards. That the supply chain manager was responsible for the stock movement and stock levels.

That on the 9<sup>th</sup> November 2011, he had informed the stock inspection committee and his supervisor about the shortage in the delivery made. He had no intention to cover up the matter.

The Claimant signed a stock take report on 14<sup>th</sup> November 2011. He told the Court that the audit was done in his absence. He said that he was already handcuffed by the police when he was asked to sign the report. He insisted that he was coerced to sign the same.

The Claimant also said that he had discretion to sign for less quantities of stock provided that the gap was filled soon enough.

9. The Claimant also told the Court that he had a clean record at work and this was the first disciplinary case against him. However during cross examination, he agreed that he had a previous warning following loss of books worth Kshs.158,580.00 on 26<sup>th</sup> June 2009. He also received a warning on 28<sup>th</sup> October 2010, following wrongful hiring of casual staff. He however, stated that the hire of casual staff had been approved.

Indeed, the Claimant admitted having had five (5) previous disciplinary cases prior.

10. The Claimant responded to the notice to show cause and had opportunity to explain his case at a disciplinary hearing held by the Respondent. The minutes of the disciplinary hearing were produced in Court. The Board approved the Claimant's termination.

The Claimant admitted that he owed the Respondent Kshs.430,000.00 being balance of a car loan. He had kept the car upon termination. He had also borrowed Kshs.25,000.00 to buy a laptop which he had not yet repaid.

11. Furthermore, the Claimant was partly paid Kshs.333,000 as terminal benefits. He therefore asked the Respondent to give him the Logbook of the car since he had cleared the balance.

The Claimant now claims as follows;

1. Arrear salary for the months of January to March 2012 at Kshs.110,895 per month in the sum of Kshs.332,685.00;
2. Twenty seven (27 days salary for April 2012 in the sum of Kshs.99,805.50.
3. One(1) month salary in lieu of notice in the sum of Kshs.110,895.00
4. Thirty nine (39) days untaken leave in the sum of Kshs.144,163.50; and
5. Twelve months maximum compensation for unlawful / wrongful termination in the sum of Kshs.1,330,740.00.

12. **Respondent's case**

The Respondent relies on the Amended Memorandum of Response, the counterclaim and the list of documents as filed. The Respondent also called RWI Patrick Mabera, RW2, Roselyn Mudavadi, RW3, David Musembi and RW4 Rebecca Ruguru in support of its case.

13. The Respondent provides the following reasons for the termination of employment of the Claimant;

That on 9<sup>th</sup> November 2011, the Claimant and RWI , a security guard received 200 reams of paper on behalf of the Respondent but the Claimant signed for 250 reams being the figure that appeared in the invoice and delivery note.

The Claimant admitted this fact but explained that he had a verbal arrangement with the supplier to bring the balance of 50 reams the following day. That the L.P.O. for 3,000 reams was being supplied in instalments and so there was nothing wrong in receiving the less amount on 9<sup>th</sup> November 2011.

14. The Respondent states that the action by the Claimant contravened the Respondent's procedures for procurement which was produced and appears from page 28 – 59 of the Claimant's list of documents.

The Respondent states that the explanation by the Claimant was not plausible and was rightly rejected by the Respondent.

15. RW3 told the Court that, what was worse in this matter is that, the Claimant falsified the records to reflect that he had received 250 reams when in fact only 200 reams had been received. This was a case of attempted fraud according to RW3.

16. On 10<sup>th</sup> November 2011, another set of 250 reams was delivered but the Claimant cancelled the delivery note to reflect 200 reams were received. RWI signed the delivery note since the Claimant refused to sign for it. This explanation clearly comes out of the Claimant's answer to the notice to show cause.

17. The Respondent states that the Claimant was not candid on this matter and submits that the Claimant was guilty of attempted fraud.

Secondly, the Claimant was liable in respect of the shortage of 722 reams in the stores. This is clearly shown in the Audit report and supported by the testimony of RW3. The Audit was carried out on 10<sup>th</sup> November 2011 covering the period 30<sup>th</sup> June 2011 to 10<sup>th</sup> November 2011. A comparison of the physical stock and the records revealed this deficit.

18. It is the Respondent's case that the Claimant was responsible for the shortfall since he was in charge of stock receipts and movement.

That the Claimant was unable to give a plausible explanation for the shortfall in the notice to show cause and at a disciplinary hearing convened to hear his case.

The Claimant according to the Respondent does not deny that there was a shortfall but only seeks to blame his subordinate staff for the loss and system error.

The Respondent rejects these explanations and told the Court that there was actual loss of stock attributed to the Claimant.

19. Thirdly, the Claimant was accused of failing to update the Bin Cards. According to RW3 a Bin card is a record showing the movement of goods in and out of the store. The clerk, Elizabeth Lesoi did this work under the supervision of the Claimant. The clerk at the time was disciplined for neglect of duty but the Claimant was equally liable for the omission. This therefore was a lawful basis for the termination of his employment.

20. The Respondent summed up the reasons for the disciplinary action against the Claimant in the compulsory leave letter as neglect of duty under section 6.41 (1)(c) of the Respondent's terms and conditions of service.

21. RW2, the Human Resource Officer, told the Court that reference to (b) in the letter was an error as the actual offence was 6.41 (c) of the terms and conditions of employment.

This provision states that the Managing Director or the Board may summarily dismiss an employee or impose lesser penalty for wilful neglect of duty.

22. The Respondent submits that the Claimant had wilfully neglected duty in respect of the three charges levelled against him and was therefore lawfully meted with a lesser sanction of normal termination instead of a summary dismissal.

23. Furthermore, the respondent submits that the Claimant had several warnings and therefore his work record was not favourable and the Respondent had a valid reason to terminate his employment and did so following a fair procedure by giving him a show cause letter to which he had responded and invited him to attend a disciplinary hearing where he explained himself.

#### 24. **Admission by the Respondent**

The Respondent opted for normal termination of the Claimant instead of summary dismissal and admits that the Claimant is owed;

1. Salary arrears from July to December 2010 in the sum of Kshs.59,010.00 upon salary review.
2. salary arrears from January to 27<sup>th</sup> April 2012 in the sum of Kshs.291,527.00;
3. one month salary in lieu of notice in the sum of Kshs.75,395.00;
4. six days leave in the sum of Kshs.15,075.00;
5. house allowance for July to December 2011 in the sum of Kshs.24,000.00.
6. Total Kshs.577,011.33.

Less PAYE Kshs.140,704.00

NSSF Contributions Kshs.800.00

Pension Contribution Kshs.26,290.00

Net Kshs.409,217.00

#### 25. **Final Determination**

From the totality of evidence, the Court is satisfied that the Claimant was grossly negligent in the performance of his duties.

The Claimant has not made a satisfactory explanation of his actions and omissions as enumerated in the notice to show cause before the Court.

26. The Respondent has discharged its onus in terms of **Section 43(1)** and **(2)** of the **Employment Act**, as read with **Section 47(5)** in that the Respondent has demonstrated that it had a valid reason to terminate the employment of the Claimant and therefore the termination was justified in the circumstances of the case.

27. The Respondent would have opted to summarily dismiss the Claimant from employment which would have denied the Claimant various terminal benefits but it did not.

The Respondent acted humanely and in a reasonable manner in the circumstances of this case.

28. **Counter Claim**

The Court finds that the Respondent has established that it was owed Kshs.438,702.65 in respect of a car loan and advance for a laptop.

29. **Set-off**

The Court sets-off the sum of Kshs.438,702.65 against the admitted terminal benefits of Kshs.409,217.32.

This leaves the Claimant with a balance of Kshs.29,485.65 owed to the Respondent in respect of the loan advance.

The Respondent is to release the Logbook of the car to the Claimant upon payment of the balance aforesaid.

The Respondent is also to provide the Claimant with a certificate of service within fourteen (14 days) from the date of this Judgment.

30. **Costs**

Since both parties are partly successful in this matter, each party is to meet their own costs of the suit.

***Dated and Delivered at Nairobi this 5<sup>th</sup> day of December, 2014***

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**